(9)

Supreme Court, U.S.
FILED
AUG 30 1995
OFFICE OF THE CLERK

No. 94-2135

In The
Supreme Court of the United States
October Term, 1995

CITY OF MORGAN CITY,
Petitioner,
v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., AND THE UNITED STATES OF AMERICA, THROUGH THE RURAL UTILITIES SERVICE,
Respondents.

On the Petition for a Writ of Certiorari to the United States Court Of Appeals for the Fifth Circuit

---

BRIEF *AMICUS CURIAE* OF THE MISSISSIPPI CITIES OF OXFORD, COLUMBUS, TUPELO, AND STARKVILLE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

T.H. Freeland, III
*T.H. Freeland, IV
FREELAND & FREELAND, LAWYERS
1013 Jackson Avenue
P. O. Box 269
Oxford, Mississippi 38655
(601) 234-3414
ATTORNEYS FOR AMICI,
*Counsel of Record

M.W. Snopes Printing Services, Inc. - (601) 234-1009- Jefferson, MS

17 pp

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE PETITION PRESENTS AN ISSUE OF IMPORTANCE TO THE MUNICIPALITIES WHO FILE THIS BRIEF	3
II. THE PETITION PRESENTS AN ISSUE OF NATIONAL IMPORTANCE INVOLVING FEDERAL-STATE RELATIONS	5
III. THE LOWER COURT'S FINDING OF FRUSTRATION PREEMPTION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT	8
CONCLUSION	13

TABLE OF AUTHORITIES

CASES

	Page
Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983)	2, 7-9, 12
FERC v. Mississippi, 456 U.S. 742 (1982)	9
Hines v. Davidowitz, 312 U.S. 52 (1941)	10-11
Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986)	11
Munn v. Illinois, 94 U.S. 113 (1877)	9
New England Power Co. v. New Hampshire, 455 U.S. 331 (1982)	9
Pacific Gas & Electric Co. v. State Energy Resources & Development Commission, 461 U.S. 190 (1983)	8-11
Rice v. Santa Fe Elevator Corp, 331 U.S. 218 (1947)	10

STATUTES AND RULES OF COURT

7 U.S.C. § 902	6
Miss. Code Ann. § 11-27-1 *et seq.*(1972)	4 n.2
Miss. Code Ann. § 21-27-23 (Supp. 1994)	4 n.2
Sup.Ct.Rule 37.5	1 n.1

REGULATIONS

7 C.F.R. § 1710.12(b)(5)	12

LEGISLATIVE HISTORY

H.Conf.Rep. No. 100-495, 100th Cong., 1st Sess. *at 512*, reprinted in 1987 U.S.C.C.A.N. 2313-1258.	13 n.3

80 Cong Rec 5316 (1936) (Rep. Lea); Hearing on S. 3483 before the House Committee on Interstate and Foreign Commerce, 74th Cong. 2d Sess., 30, 37, 51, 52 (1936). 8

GOVERNMENT PUBLICATIONS

Energy Information Administration, Department of Energy, *Financial Statistics of Major United States Publicly Owned Utilities (1992)* 4

OTHER AUTHORITY

National Rural Electric Cooperative Association and National Rural Utilities Cooperative Finance Corporation, *Final Report of the Territorial Integrity Committee (1990)* 5-6

Charles F. Phillips, Jr., *Regulation of Public Utilities: Theory and Practice (1988)* 6

In The

Supreme Court of the United States

October Term, 1995

No. 94-2135

CITY OF MORGAN CITY,

Petitioner,

v.

SOUTH LOUISIANA ELECTRIC COOPERATIVE ASSOCIATION, CAJUN ELECTRIC POWER COOPERATIVE, INC., AND THE UNITED STATES OF AMERICA, THROUGH THE RURAL UTILITIES SERVICE,

Respondents.

On the Petition for a Writ of Certiorari to the United States Court Of Appeals for the Fifth Circuit

---

BRIEF *AMICUS CURIAE* OF THE MISSISSIPPI CITIES OF OXFORD, COLUMBUS, TUPELO, AND STARKVILLE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This Brief *Amicus Curiae* is submitted by four municipalities, subdivisions of the State of Mississippi, the cities of Oxford, Columbus, Tupelo, and Starkville.[1] The

---

[1] As political subdivisions of the State of Mississippi, these Municipalities may file a brief *amicus curiae* without consent of the parties. Sup. Ct. R. 37.5.

municipalities respectfully support the petition of the City of Morgan City, Louisiana for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the decision of that court in *City of Morgan City v. South Louisiana Cooperative Association*, 31 F.3d 319 (5th Cir. 1994), *rehearing denied*, 49 F.3d 1074 (5th Cir. 1995).

INTEREST OF AMICUS CURIAE

Oxford, Columbus, Tupelo, and Starkville, Mississippi all operate municipal electric departments with which they provide electricity to their citizens. These cites are bounded by cooperatives financed by the Rural Electrification Association. In order to provide the same level of services to all of their citizens, these cities must be able to exercise the power of eminent domain against boundary cooperatives as new areas are annexed. The decision of the court below, in holding that such annexations are preempted because they "frustrate the purpose" of the Rural Electrification Act, would prevent these municipalities from providing electrical services to their citizens living in areas that happen to be served by REA-financed cooperatives.

SUMMARY OF ARGUMENT

The court below decided a federal question—whether the Rural Electrification Act ("REAct") preempts state law condemnation of REA financed utilities—in a manner that conflicts with the applicable decisions of this Court. In *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), this Court rejected a similar plea for preemption by the Administrator of the REA for

preemption. Lacking any explicit support for preemption in statute or regulation, and in spite of almost sixty years of history that presumes the role of state regulation, the court below held that state condemnation so "frustrates the purpose" of the REAct that condemnation actions are preempted.

The issues presented in the decision of the court below have a nationwide impact. Service of newly annexed urban areas by municipalities was an issue in at least twenty-one states in the 1980s; if the rule announced by the Fifth Circuit were national in scope, extension of this service will be halted. The municipalities filing this brief, all Mississippi cities subject to the rule announced by the court below, will be unable to provide a full range of city services to their citizens. Because of the importance of this issue to the relations of federal and state government, and because of the nationwide scope of this problem, the Petition for Certiorari by the City of Morgan City should be granted.

ARGUMENT

I. THE PETITION PRESENTS AN ISSUE OF IMPORTANCE TO THE MUNICIPALITIES WHO FILE THIS BRIEF

This case involves an important issue of federal-state relations, preemption of state law, in a context of traditional state regulation—the regulation of electrical utilities and the state's exercise of eminent domain. The opinion of the court below holds that the state may not exercise eminent domain over an electrical cooperative because such exercise would "frustrate the purpose" of the Rural Electrification Act

(hereinafter "REAct"). *City of Morgan City v. South Louisiana Electrical Cooperative*, 49 F.3d 1074, 1075 (5th Cir. 1995); App. 26a.

The lower court based its holding that the federal power had preemptively occupied state condemnation actions on the slenderest of evidence. Nothing in the express language of the REAct justifies preemption. State exercise of eminent domain does not contravene any express provision or requirement of the REAct. The sole basis of the panel holding was that exercise of eminent domain would have a negative impact on the purposes of the act in providing electricity to rural customers and assuring the collection of REA loans.

Each of the *amici* operates a municipal or other government-owned electrical utility as one of the services afforded its citizens, as do 2017 other cities in the United States. *See* Energy Information Administration, Department of Energy, *Financial Statistics of Major United States Publicly Owned Utilities 1992* at 3 (1994) (number of municipal or other government-owned utility services). Each of these *amici* is bounded by an electrical cooperative financed by the REA. Historically, as these municipalities have grown, they have annexed new territory under state annexation laws and then condemned territories served by the cooperatives that bound them. While under state law, the municipalities have compensated the cooperatives for the condemnation,[2] for over

---

[2] *See* Miss. Code. Ann. § 21-27-23 (Supp. 1994) (authorizing exercise of eminent domain); Miss. Code Ann. § 11-27-1 *et seq.* (1972) (eminent domain statutes).

sixty years there was no suggestion that such a condemnation would be preempted by the REAct.

Under the rule announced by the court below, applicable to these municipalities because they are within the Fifth Circuit, these cities will no longer be able to provide the same range of services to all of their citizens. The provision of such services is a fundamental function of municipal government in Mississippi and elsewhere. With questionable logic and in contravention of the prior decisions of this Court, *see infra* at 8-13 (discussing the lower court's failure to follow prior decisions of this court), the Fifth Circuit has interfered with the ability of these municipalities to provide those services.

II. THE PETITION PRESENTS AN ISSUE OF NATIONAL IMPORTANCE INVOLVING FEDERAL-STATE RELATIONS

The issues presented by the petition for certiorari are nationwide in scope. National surveys of REA-financed cooperatives by the National Rural Utilities Cooperative Finance Corporation reported that, in the years 1985 through 1990, over one-hundred cooperatives in twenty-one states had territory condemned in connection with municipal annexations. National Rural Electric Cooperative Association and National Rural Utilities Cooperative Finance Corporation, *Final Report of the Territorial Integrity Committee* 3, 9-13 (1990) ("*N.R.E.C.A. Report*," attached as an addendum to the *amicus* brief of the National Rural Electric Cooperative Association ("N.R.E.C.A.") in the court below). In the period covered by

this survey, annexations occurred in each state within the Fifth Circuit. *Id.* at 9-13.

It is the annexations described in the N.R.E.C.A. report that led the dissenters below to note that the holding of preemption would surprise even the cooperatives who benefited from the ruling. *City of Morgan City*, 49 F.3d at 1079; App. 34a. The report acknowledges that condemnation of territory served by cooperatives had been a long-term issue, terming loss of territory "a serious problem in at least 17 states." *N.R.E.C.A. Report* at 5.

The problem is exacerbated by the efforts of REA-financed cooperatives to serve outside the areas that are their historic and statutory mandate. The purpose of the REAct is for "the furnishing of electrical energy to persons in rural areas who are not receiving central station service...." 7 U.S.C. § 902. By the late 1970's, 98% of this market was served, and REA loans increasingly were granted to finance expansion into urban areas and provide power for industrial users. Charles F. Phillips, Jr., *The Regulation of Public Utilities: Theory and Practice* 599 (1988). The effort by cooperatives to move into non-rural territory is also driven by pressures from the REA. In the court below, the *amicus* brief of the NRECA noted that

> a combination of factors, including industry-wide excess capacity, cost overruns for generation projects associated with rapidly rising interest rates, nuclear power problems, and proliferation of environmental and other rules and regulations, and a recession, all led to serious financial problems for many companies in the electric utility industry. The rural electric program was

> no exception. As a result, borrowers, such as Cajun, had to negotiate the restructuring of their REA debt. *Virtually every such restructuring, including Cajun's, relied on the borrower's meeting certain growth projections in order for REA to recover all of its monies.* Although municipal condemnations had always created problems for REA borrowers by taking away some of their highest potential growth areas, the advent of REA debt restructuring exacerbated the problems because, for borrowers like Cajun, loss of these areas would make it virtually impossible for the borrower to meet growth projections and thus for REA to recover its loan funds.
>
> -*Amicus* Brief of NRECA at 3-4 (emphasis added).

The force driving the effort by these cooperatives and the REA to seek a ruling of preemption does not emanate from any act of Congress or from any regulation promulgated by the REA; rather it is the economic pressures described by the cooperatives in the court below.

This Court's opinion in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), rejected a similar plea by the Administrator of the REA for preemption. In ruling that Arkansas rate regulation of a cooperative was not preempted, this Court stated that "the present published policy of the REA is wholly inconsistent with pre-emption of state regulatory jurisdiction." *Arkansas Electric*, 461 U.S. at 387. While stating that the REA's guidelines recognized the power of states to regulate rates for REA

financed cooperatives, this Court noted that REA officials had not always "welcomed state regulation or thought it a good idea," and held that "such expressions of opinion do not constitute sufficient grounds for pre-emption." *Id.* at 386 n. 10. This Court stated that the legislative history of the REAct expressly provided for state regulation:

> [T]he legislative history of the Rural Electrification Act makes abundantly clear that, although the REA was expected to play a role in assisting the fledgling rural cooperatives in setting their rate structures, it would do so within the constraints of existing state regulatory schemes. See, e.g. 80 Cong Rec 5316 (1936) (Rep. Lea); Hearing on S. 3483 before the House Committee on Interstate and Foreign Commerce, 74th Cong. 2d Sess., 30, 37, 51, 52 (1936).
>
> -*Id.* at 386-87.

The opinion of the court below allows cooperatives and the REA to move beyond the "constraints of existing state regulatory schemes" contemplated by the REAct.

III. THE LOWER COURT'S FINDING OF FRUSTRATION PREEMPTION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The authority of the states to regulate electrical utilities has been repeatedly affirmed by this Court. *See Arkansas Electric Cooperative Corp.*, 461 U.S. at 377 (affirming power of state to regulate cooperatives governed by REAct); *Pacific Gas & Electric Co. v. State Energy Resources & Development Commission*, 461 U.S. 190, 193 (1983) (state bar of new

nuclear plants pending resolution of waste storage issue not preempted by federal policy of encouraging nuclear power). The authority of states to regulate utilities has been a central theme in this Court's preemption and commerce clause cases:

> Maintaining the proper balance between federal and state authority in the regulation of electric and other energy utilities has long been a serious challenge to both judicial and congressional wisdom. On the one hand, the regulation of utilities is one of the most important functions traditionally associated with the police power of the States. *See Munn v. Illinois*, 94 U.S. 113 (1877). On the other hand, the production and transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests. *See FERC v. Mississippi*, 456 U.S. 742, 755-57 (1982); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982).
>
> *-Arkansas Electric*, 461 U.S. at 377.

The state's role in regulating utilities persists even in areas of heightened federal concern such as nuclear power:

> Early on, it was decided that the States would continue their traditional role in the regulation of electricity production. The interrelationship of federal and state authority in the nuclear energy field has not been simple; the federal regulatory structure has been frequently amended to optimize the partnership.

-*Pacific Gas*, 461 U.S. at 194.

At issue in *Pacific Gas* was whether the Atomic Energy Act preempted a California act that "condition[ed] the construction of nuclear plants on findings by the State Energy Resources Conservation and Development Commission that adequate storage facilities and means of disposal are available for nuclear waste...." *Id.* at 194-95. This Court noted the traditional importance of the state role in regulation of generation of electricity:

> Thus, "Congress legislated here in a field which the States have traditionally occupied .... So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."
>
> -*Id.* at 206 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (alteration in original).

Most relevant to this case, this Court rejected the argument that the state statute frustrated the explicitly-stated Congressional purpose of encouraging nuclear power:

> Finally, it is strongly contended that § 25524.2 frustrates the Atomic Energy Act's purpose to develop the commercial use of nuclear power. It is well established that state law is pre-empted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 US at 67....
>
> There is little doubt that a primary

> purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power. The Act itself states that it is a program "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public." 42 USC § 2013(d).
>
> -*Pacific Gas*, 461 U.S. at 220-221 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

This Court concluded that, given the balance of federal-state authority established by Congress and the evidence of authority Congress left to the states, "it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the States to undercut a federal objective. The courts should not assume the role which our system assigns to Congress." *Pacific Gas*, 461 U.S. at 222-23.

The opinion below falls prey to two analytical errors. In the first place, the lower court frames the purpose of the REAct in the broadest possible terms, allowing preemption to reach far more broadly than Congress would have anticipated. This Court has consistently refused to allow sweeping statements of Congressional purpose to serve as the basis to preempt state laws in areas traditionally left to state regulation. *See Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 370 (1986) (rejecting argument that Communications Act of 1934 preempted state regulation of intrastate telephone services that arguably "frustrat[ed] the ability of the FCC to perform its statutory function of ensuring efficient, nationwide phone

service"). In the second place, the lower court opinions show too great a willingness to accept the opinion of the administrator of the REA as to the purposes of the REAct and whether the proposed condemnation frustrates those purposes. *See supra* at 7 - 8 (discussing this Court's rejection in *Arkansas Electric* of the opinion of the REA administrator favoring preemption).

The REA is in no sense a regulator of utilities, it is "a lending agency rather than a classic public utility regulatory body...." *Arkansas Electric*, 461 U.S. at 386. It should also be recalled that the purpose of the act is to provide a federal subsidy to make rural electrification economically feasible. In taking the position that customers in high-density areas must subsidize those in rural areas, the REA ignores the actual purpose of the act, to provide federally-supported financing for electricity in rural areas. Further, in taking the position that its borrowers are shielded from state eminent domain procedures, even where the eminent domain procedure is shown to satisfy the REA security interest, the REA is reaching beyond its interest as a lender.

A reading of the REA's own regulations shows that the REA has not previously taken the view that municipal condemnations or annexations were preempted. In making loans, the REA was to evaluate "[r]isks of loss of portions of the borrower's service territory from annexation or other causes will not substantially impair loan feasibility." 7 C.F.R. § 1710.12 (b)(5). If the REAct preempts state law in the manner

advanced by the REA and the panel opinion, this regulation is nonsense.[3]

CONCLUSION

For the reasons and those set forth in the petition for certiorari of the City of Morgan City, the petition for certiorari should be granted.

Respectfully submitted,

T.H. Freeland, III
*T.H. Freeland, IV
FREELAND & FREELAND,
LAWYERS
1013 Jackson Avenue
P. O. Box 269
Oxford, Mississippi 38655
(601) 234-3414

ATTORNEYS FOR AMICI,
MISSISSIPPI CITIES OF OXFORD,
COLUMBUS, TUPELO and
STARKVILLE

*Counsel of Record

---

[3]There is legislative history that demonstrates that Congress understands that the Rural Electrification Act does not preempt state condemnations and annexations. In 1987, an attempt was made to require the REA administrator to approve acquisition of the property of a cooperative through annexation or condemnation. H.Conf.Rep. No. 100-495, 100th Cong., 1st Sess. at 512, *reprinted in* 1987 U.S.C.C.A.N. 2313-1258. While this bill passed the House, it did not pass the Senate and did not pass out of the conference. If the panel reading of the Rural Electrification Act is correct, this bill (like the REA regulations) would have been nonsense.